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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 654

CLAY E. HUNTER, *Petitioner*

v.

STATE OF OHIO, EX REL. ROY E. MILLER, THE STARK COUNTY BOARD OF ELECTIONS, TED W. BROWN, Secretary of State, *Respondents*

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Clay E. Hunter prays for leave to intervene and further prays that a writ of certiorari be granted to review the judgment of the Supreme Court of Ohio entered in *State ex rel. Miller* v. *Gwin* on June 18, 1969.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio in *State ex rel. Miller* v. *Gwin* is printed at Appendix B hereto, p. 10a, *infra,* and is reported at 18 Ohio St. 2d 66 (1969). The opinion of the Supreme Court of Ohio in *State ex rel. Graves* v. *Brown* is printed at Appendix B, pp. 11a to 13a, *infra,* and is reported at 18 Ohio St. 2d 61 (1969). The opinion of the Attorney General of Ohio is printed at Appendix B, pp. 13a to 20a, *infra,* and is reported at 1968 O.A.G. (Ohio) 110.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on June 18, 1969. On September 16, 1969, petitioner applied for a time extension to file this petition and on September 17, 1969, Mr. Justice Stewart extended the time to file this petition until October 16, 1969, "without prejudice to the Court's consideration of the standing of the applicant as a petitioner in this case." This Court has jurisdiction under 28 U.S.C., § 1257(3).

QUESTIONS PRESENTED

The Supreme Court of Ohio has ruled that petitioner, a sitting judge over the age of 70, is ineligible to seek re-election in November of 1969 despite the fact that the Ohio legislature proposed to the Ohio voters in 1968 a lengthy revision of the Ohio Constitution that *inter alia* would have permitted such sitting judges to be re-elected until 1971. The court held that this proposal was not before the voters or adopted by them inasmuch as it was not specifically mentioned in the fifteen line summary of the extensive revisions that appeared on the ballot in 1968. The questions presented are:

(1) Does petitioner, who was not made a party to the original action in the Supreme Court of Ohio and who was denied intervention following that court's declaration of his ineligibility have sufficient legal interest and standing to seek and be granted a writ of certiorari in this Court to review the Ohio court's ruling, where none of the parties to the original action seek review by this Court?

(2) Are the voters of Ohio denied the due process of law guaranteed by the Fourteenth Amendment by having their right to enact state constitutional amendments and to vote for state judges of their own choosing effectively diluted by an arbitrary state court ruling that only those matters referred to in a brief condensation on the ballot of extensive constitutional changes proposed to the voters by the state legislature can be considered adopted?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves Sec. 1, Amendment 14, United States Constitution; Article IV, and Sec. 1 of Article XVI of the Ohio constitution; and § 3505.06, Revised Code of the State of Ohio. These are reprinted at Appendix A, *infra,* pp. 1a to 9a.

STATEMENT OF THE CASE

Petitioner is a duly elected, qualified judge of the Municipal Court of the City of Canton, Ohio, and his term expires January 2, 1970. Petitioner is 74 years of age. On January 22, 1969, petitioner filed nominating petitions for the position of judge of the Municipal Court of Canton, Ohio, with the Board of Elections of Stark County, Ohio. Since no other candi-

date took out or filed nominating petitions for the May primary, petitioner was declared a candidate for the general election to be held in November 1969.

The case arose on the following undisputed facts: In March 1968 the legislature of the State of Ohio by Joint Resolution adopted a proposed comprehensive revision to Article IV of the constitution of the State of Ohio (Appendix A, *infra,* pp. 1a to 8a) relative to the administration and organization of the courts of Ohio. Included was a provision barring judges beyond the age of 70 from holding office; however, a "grandfather clause," Section (E) of the "Schedule," permitted judges, regardless of age, to seek re-election until after 1970, to wit:

> EFFECTIVE DATE AND REPEAL
>
> If adopted by a majority of the electors voting on this amendment, the amendment except paragraph (B) of the Schedule shall take effect January 10, 1970, and existing sections 1 and 2, and sections 3, 4, 6, 7, 8, 10, 12, and 14 of Article IV of the Constitution of Ohio shall be repealed from such effective date. Paragraph (B) of the Schedule and the repeal of sections 12 and 13 of Article XI adopted in 1851, shall become effective immediately upon the adoption of this amendment by the electors of this state.
>
> SCHEDULE
>
> Upon the effective date of this amendment:
>
> * * * * *
>
> (E) Any judge who is holding office on December 31, 1969, and who would be eligible for re-election in 1970 for a term beginning in 1971 except for his age and the provisions of division (C) of Sec-

tion 6, Article IV, shall be eligible nevertheless to be re-elected in 1970 for one additional term as judge of the same court.

In accordance with Section 1, Article XVI of the Ohio Constitution (Appendix A, p. 9a, *infra*), the proposed constitutional amendment was published in its entirety for five consecutive weeks in newspapers of general circulation in every county of the State of Ohio, and under the provisions of § 3505.06 Revised Code of Ohio was posted at each polling place on election day. The Resolution was put before the voters and adopted on May 7, 1968.

The proposed amendment appeared on the ballot as a fifteen-line summary of the six printed page Joint Resolution in the following form:

PROPOSED CONSTITUTIONAL AMENDMENT ADMINISTRATION AND ORGANIZATION OF OHIO JUDICIAL SYSTEM

(Proposed by Resolution of the General Assembly of Ohio)

A majority affirmative vote is necessary for passage.

Shall the Constitution of the State of Ohio be amended by amending Sections 1 and 2, enacting Sections 3, 4, 5 and 6 and repealing existing Sections 3, 4, 6, 7, 8, 10, 12 and 14 of Article IV and by repealing Sections 12 and 13 of Article 11 as adopted in 1851 to provide that the Supreme Court shall decide all cases by majority vote, to fix the power of the Supreme Court of Ohio to exercise administrative supervision over all courts and to make rules of practice and procedure, to prohibit the election or appointment to any judicial office of a person who shall have passed the age of 70 years, to equalize judges' salaries and to allow increases in compensation during term, to

> remove the Probate Court as a constitutional court and to authorize the consolidation of county Probate Courts and Courts of Common Pleas?

(Appendix C, p. 20a, *infra*). The summary did not specifically refer to Section (E) of the "Schedule," the "grandfather clause" which permitted judges over the age of 70 to run for re-election until 1971.

Respondent Roy E. Miller, in his status as a qualified voter and taxpayer, filed an original action in the Supreme Court of Ohio on May 15, 1969, seeking a Writ of Prohibition to prohibit the Stark County Board of Elections from placing petitioner's name on the ballot, naming as parties the Board of Elections and the Secretary of State. Petitioner was not made a party to the action. The Supreme Court of Ohio on June 18, 1969 granted the Writ of Prohibition on the authority of its decision in *State ex rel. Graves* v. *Brown,* 18 Ohio St. 2d 61 (1969) (Appendix B, pp. 11a, *infra*), a review of which is necessary to the understanding of this case.

State ex rel. Graves v. *Brown, ibid,* was also an original action for Writ of Prohibition filed in the Supreme Court of Ohio. The case was filed on March 28, 1969, to remove the name of Judge Stephen A. Zona from the ballot in the May 6, 1969 primary as a Democratic candidate for nomination for the office of judge of the Municipal Court of Parma, Ohio. On April 30, 1969, the court granted the writ for the reason that no reference to Section (E) of the Schedule, the "grandfather clause," appeared on the condensed ballot text prepared by the Secretary of State, and therefore the issue was not before the voters. The Court ruled:

> If the General Assembly had intended that Section (E) be given effect, it could have provided

that the question of postponement be submitted to the electorate as a part of the condensed ballot text. The failure to so have presented the question to the electorate destroyed the efficacy of Section (E) of the schedule.

The denial of the constitutional rights of petitioner and all voters was adequately raised during the litigation. In the Demurrer and Brief of respondent, the Stark County Board of Elections, it was stated at pp. 6-9:

> Recognizing the possibility that this Court will determine that the decision of *State ex rel Graves vs Brown, supra,* will require that the court prohibit the Board of Elections of Stark County from issuing a certificate of nomination to the Honorable Judge Clay E. Hunter, then the question that arises is whether under the circumstances as set forth in the Agreed Statement of Facts the Democratic party by its central committeemen shall be permitted to substitute a candidate for Judge Hunter on the ballot for the November, 1969, general election, pursuant to *R. C. 3513.31.*
>
> It should be noted at the outset that the Democratic voters at the May, 1969, primary had no opportunity whatsoever to cast a ballot for a candidate as a representative of their party for the November, 1969, election. In view of the fact that Judge Hunter was the only candidate filing petitions pursuant to the law, no ballot was submitted to the electorate so they did not even have the opportunity to write in a candidate and vote for him. The Board of Elections in not providing ballots for the Democratic party voters was following the mandate of *R. C. 1901.07* and *R. C. 3513.02.* At the time the Board of Elections made the decision to consider Judge Hunter as the only candidate for the Democratic party for the nomination so as to eliminate the necessity of providing

a ballot for the Democratic voters, the Stark County Board of Elections was operating in compliance with the Opinion No. 68-110 of the Attorney General of the State of Ohio issued July 5, 1968, [Appendix B, pp. 13a to 20a, *infra*] and also in compliance with the directive of Secretary of State Ted W. Brown in his bulletin dated January 15, 1969, as set forth in the Agreed Statement of Facts.

The subsequent decision of this court in *Graves* v. *Brown, supra,* was not to come until the 30th of April, 1969.

* * * *

It is submitted that a strict interpretation of the provisions of *R. C. 3513.31* in this unique factual situation would be in direct conflict with the "Right to Vote" as described and stressed by the Supreme Court of the United States in its October, 1968, decision permitting the Ohio American Independent Party's Presidential candidate George Wallace the right to be on the Ohio, 1968, Presidential ballot despite the party's failure to comply with the Ohio election laws. *Williams vs Rhodes,* 37 LW 4001, October 15, 1968.

In delivering the opinion of the Supreme Court, Judge Black stated in part as follows:

> "... In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, or course, rank among our most precious freedoms. . . . Similarly we have said with reference to the right to vote: 'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even

> the most basic, are illusory if the right to vote is undermined'. . . . The State has here failed to show any 'compelling interest' which justifies imposing such heavy burdens on the right to vote. . . ."

The respondent (relator below) Roy E. Miller argued in his Reply Brief (pp. 3-4) that the action of the legislature and voters postponing the effective date of the age limitation "was a nullity" in view of *State ex rel Graves* v. *Brown*. The Supreme Court of Ohio, in granting the Writ of Prohibition in the instant case, simply cited *State ex rel Graves* v. *Brown* as authority and did not respond to the constitutional issues raised by the respondent, Board of Elections.

When petitioner became informed that none of the named party respondents intended to proceed further with an appeal, he filed an Application to Intervene in the Supreme Court of Ohio on August 13, 1969, so that he could file an appeal or petition for certiorari to this Court. The Application to Intervene was denied without comment on Friday, September 12, 1969, and petitioner applied for reconsideration of the denial to intervene on Monday, September 15, which was also denied on Tuesday, September 16, 1969.

REASONS FOR GRANTING INTERVENTION AND THE WRIT OF CERTIORARI

A. The petitioner has standing to seek review of the ruling of the Supreme Court of Ohio even though he was not a party to that action

An original action was brought in the Supreme Court of Ohio naming the Stark County Board of Elections and the Secretary of State as respondents, with the purpose of removing petitioner's name from the ballot for the office of Municipal Judge. He, however, was

not made a party. Petitioner relied upon the named respondents to represent his interests and the interests of all other Ohio voters. However, after an adverse decision ruling petitioner off of the ballot, he was notified by the Board of Elections and the Secretary of State that they would not seek review in the Supreme Court of the United States. Petitioner thereafter applied to the Supreme Court of Ohio for leave to intervene on August 13, 1969, for the purpose of seeking review by the Supreme Court of the United States, and that application was denied on Friday, September 12. The petitioner applied for reconsideration of the denial to intervene on Monday, September 15, 1969. Not having been advised by the Ohio court by the morning of Tuesday, September 16, 1969, the ninetieth day from judgment, petitioner filed in this Court an application for leave to intervene and for an extension of time in which to petition for certiorari. On September 17 Mr. Justice Stewart granted an extension of time until October 16 "without prejudice to the Court's consideration of the standing of the applicant as a petitioner in this case." On the afternoon of Tuesday, September 16, 1969, upon reconsideration, the Supreme Court of Ohio denied the petitioner leave to intervene.

There is no question that petitioner has standing to complain of the Ohio court's ruling. The test as stated in *Baker* v. *Carr*, 369 U.S. 186, 204 (1962) is:

> Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.

Since it was the petitioner's name and his alone that has been removed from the ballot by the ruling of the Supreme Court of Ohio, he unquestionably has a personal stake in the outcome of the controversy. Petitioner asserts his rights, however, not only as a candidate for office but as a citizen of the State of Ohio on his own behalf and on behalf of all other citizens and voters of the State of Ohio. *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Baker* v. *Carr*, 369 U.S. 186, 206-208 (1962); *Barrows* v. *Jackson*, 346 U.S. 249, 255-58 (1953).

Petitioner recognizes that the more usual course of action would be to seek review of the denial of the application to intervene. However, since Judge Hunter's contested election is on November 4, 1969, such an appeal, even if successful, would be meaningless. "A court of appeals may, but only in an exceptional case for imperative reasons, permit intervention where none was sought in the district court." *McKenna* v. *Pan American Petroleum Corp.*, 303 F. 2d 778, 779 (5th Cir. 1962), vacated on other grounds, 384 U.S. 63 (1966). Intervention may be granted after entry of a final decree if it is necessary to preserve some right which cannot otherwise be protected. *United States* v. *Northern Securities Co.*, 128 Fed. 808 (C.C. S.D. Minn. 1904), aff'd on other grounds, 193 U.S. 197 (1904). Petitioner submits that imperative reasons exist in this case: (1) the action appealed from was an original action in the Supreme Court of Ohio and there is no intermediate appeal below this Court; (2) the Supreme Court of Ohio delayed until the last moment in acting on Judge Hunter's petition to intervene, thereby prejudicing his right to seek earlier review; (3) respondents in the lower court, the Board

of Elections and the Secretary of State, have done nothing to appeal the ruling adverse to them and to protect the rights of petitioners and of the voters of Ohio. E.g., *Wolpe* v. *Poretsky,* 144 F.2d 505 (D.C. Cir. 1944), cert. denied, 323 U.S. 777 (1944). (Intervention permitted after judgment where a zoning board failed to appeal an adverse decision prejudicing the rights of effected property owners.) This Court has also permitted intervention after judgment (although at the trial level), where public authorities failed to enforce the rights of private individuals, stating:

> Plainly enough, the circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the nisi prius court. But where the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion. *Missouri-Kansas Pipe Line Co.* v. *United States,* 312 U.S. 502, 506 (1941).

This Court has recently permitted intervention in order to present a petition for certiorari and has thereupon granted a writ of certiorari in circumstances identical to the instant case, in *Banks* v. *Chicago Grain Trimmers Assoc.,* 390 U.S. 459 (1968). In that case, after a claim under the Longshoremen's and Harbor Workers' Compensation Act was the subject of an award to Mrs. Banks, the insurance company instituted an action in the United States District Court against the Deputy Commissioner of Labor, without naming

Mrs. Banks as a party. After losing in the District Court, the insurance company appealed and obtained a reversal from a Court of Appeals. Mrs. Banks did not intervene either in the District Court or the Court of Appeals. The Government, through the Solicitor General, declined to file a petition for writ of certiorari on the ground that no substantial federal question was involved, leaving Mrs. Banks in the same position as petitioner here: the government agency which had been representing her interests and which was a party declined to appeal the decision. Mrs. Banks' unsuccessful attempts to intervene in the lower courts were not made until after an extension of time for filing a petition was granted to her by a Justice of this Court. See, Petition for Leave to Intervene and Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, No. 59—Oct. Term 1967.)

This Court invited the Solicitor General to file a brief expressing the views of the United States. 386 U.S. 1002 (1967) Mr. Justice Marshall (then Solicitor General) filed a Memorandum for the Deputy Commissioner (Department of Labor), supporting Mrs. Banks' petition to intervene, stating at pp. 2-3:

> 1. There is a threshold question whether this Court has jurisdiction to grant a writ of certiorari as prayed for in the petition. While it is true that "any party" may file a petition (28 U.S.C. 1254(1)), petitioner was not formally made a party in the proceedings below. She did not seek leave to intervene until after the judgment of the court of appeals was rendered, and the motion to intervene which she then filed was denied by the district court. On the other hand, the procedure

whereby the award is defended by the government in the courts is not designed to vindicate any independent governmental interest, but, rather, to remove the burdens of litigation from the shoulders of the compensation claimants, who are rarely individuals of means. In a practical sense, therefore, the claimant is the real party in interest in the judicial proceedings even if not formally named, and it would not appear unreasonable to deem petitioner a party below for purposes of entitlement to file a petition for a writ of certiorari.[1]

[1] Alternatively, if petitioner could be said to have perfected an appeal to the court of appeals from the order of the district court denying intervention, the petition could be viewed as seeking review not only of the court of appeals' judgment but also of the refusal to permit her to intervene. In that event, if the Court agreed that intervention was wrongly denied (and we can think of no sound reason for denying intervention to petitioner), it would be free also to consider the merits of the judgment below. *Cascade Natural Gas Corporation* v. *El Paso Natural Gas Co.*, 386 U.S. 129.[1]

This Court granted the petition for intervention and for writ of certiorari, 389 U.S. 813 (1967), and decided the case on the merits, 390 U.S. 459 (1968).[2]

[1] In the *Banks* case, jurisdiction was asserted under 28 U.S.C. § 1254(1) which provides that "any party" may file a petition. That action did not deter the Court from granting the petition for writ of certiorari. In the instant case such problem does not exist since jurisdiction is invoked under 28 U.S.C. 1257 which imposes no requirement, that only "a party" may petition for writ of certiorari or appeal.

[2] Cf. *Eastern-Central Motor Carriers Ass'n.* v. *United States*, 321 U.S. 194, 199, n. 5 (1944), and *N. L. R. B.* v. *Acme Industrial Co.*, 384 U.S. 925 (1966), where intervention in cases already pending before this Court was allowed to persons who had not been parties to the proceedings below but who had a vital interest in the eventual resolution of the cases.

Petitioner submits that he has a personal stake in the outcome of this controversy, that imperative reasons exist for permitting him to intervene at the appellate level, that his rights, and the rights of all voters, have not been safeguarded by the respondent-governmental agencies, and that this Court has in the past for such reasons permitted intervention in order to present to this Court a petition for writ of certiorari and to have it considered on its merits.

B. The voters right to select their form of government and to elect their public officials has been denied without due process of law

The will of the voters of Ohio in making their laws, choosing their form of government, and selecting their public officials, has been effectively nullified by the decision of the Supreme Court of Ohio. The right to vote is a "fundamental political right" that is "preservative of all rights." *Williams* v. *Rhodes,* 393 U.S. 1, — 21 L.Ed. 2d 24, 36 (1968) (Justice Douglas concurring); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). This Court has further stated:

> Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote. . . . The right to vote can neither be denied outright . . . nor destroyed by alteration of ballots . . . nor diluted. . . . The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right

strike at the heart of representative government. *Reynolds* v. *Sims*, 377 U.S. 533, 554-55 (1964).

The voters and citizens of Ohio have chosen a Republican form of government by electing their State legislature, and by designating it to be their representative for enacting the laws of the State. Cf. *Baker* v. *Carr*, 369 U.S. 186, 222, n. 48 (1962); *Minor* v. *Happersett*, 21 Wall (U.S.) 162, 175-76 (1875). The legislature of Ohio, by Joint Resolution of both Houses, proposed a revision to the Judicial Article of the Ohio constitution, effecting such matters as the jurisdiction of the courts, the regulation of the practice of law, the division of the State into appellate districts and the organization of the courts in such districts, the organization of courts of inferior jurisdiction, the election of judges to all courts, and the procedures and qualifications of candidates for judicial office. Included in the Joint Resolution was a provision making the Amendment, if approved by the voters, prospectively operative. Also included was a savings clause denoted "Schedule," concerning cases, judges holding office, and rules of practice pending at the time of the adoption of the constitutional article.

The Ohio constitution, Article XVI, provides that the source of proposed constitutional changes shall be either in the legislature as approved by the electorate through a referendum or by constitutional convention. After having been published in newspapers of general circuation throughout the State for five consecutive weeks in accordance with that article, and posted at the polls on election day pursuant to section 3505.06 of the Revised Code of Ohio, the proposed revision was put before the voters and approved on May 7, 1968. The Supreme Court of Ohio has here ruled that the

condensed version of a proposed constitutional amendment, prepared by the Secretary of State, as it appears on a sample ballot presents the only issues which can be adopted by the voters of Ohio.

It has now been held that only those matters which appeared in the fifteen-line condensed ballot text were before the voters and that if the General Assembly of Ohio had wanted more to be on the ballot, it could have told the Secretary of State to include it as part of the condensed ballot text. *State ex rel. Graves* v. *Brown,* 18 Ohio St. 2d 61 (1969). Obviously the Ohio legislature wanted the entire amendment to be on the ballot; otherwise it would not have gone to the futility of proposing it and instructing the Secretary to put it before the voters.

The court's ruling, in effect, gives the Ohio Secretary of State the power to propose amendments to the constitution of the State of Ohio and to veto actions of the Ohio legislature in violation of the provisions of the constitution of the State of Ohio, simply by the way he phrases the ballot summary. This ruling deprives the Ohio legislature of the power granted to it by the Ohio constitution to propose constitutional amendments, and deprives the petitioner and all other voters of Ohio of due process of law in that their will, expressed at the ballot box, has been and may be controlled or denied by administrative action of the Secretary of State.

The Court's opinion in the instant case, *Ohio ex rel. Miller* v. *Gwin,* Ibid., in *State ex rel. Graves* v. *Brown,* Ibid., and in *City of Euclid* v. *Heaton,* 15 Ohio St. 2d 65, 238 N.E. 2d 790 (1968), has now overruled the voters' desires regarding the manner by which they

select their judges, and has prevented their voting on particular judges who are running.[3]

The federal constitutional right, of course, relates to the voter's right to have his vote made effective and counted in an undiluted manner as to all propositions and candidates properly on the ballot. In the context of this case, that federal due process right means that the Ohio voters had the right to have their votes counted as to the entire provisions of the constitutional amendments properly put before them in the 1968 ballot and to have their votes fully counted as to the judicial candidates qualified to be on the 1969 ballot. But that right was diluted and the votes made ineffective by the unreasonable process of limiting the scope of the votes in terms of the omissions, dictated by space limitations on the ballots, that the Ohio Secretary of State intentionally or unintentionally made in the ballot summarization. In the constitutional sense, the ruling below is no different than if it prohibited or outlawed all votes cast for an express proposition on the ballot permitting re-election of all sitting judges who are 70 years or older. The Fourteenth Amendment should not permit a state court to deprive state

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[3] In *Euclid* v. *Heaton* the Court ruled that since the proposed effective date of the proposed amendment was also not in the condensed text, all of its provisions took effect immediately, thereby allowing a simple majority of the Supreme Court rather than a six-judge concurrence to reverse the judgment in a criminal case. The decision in *Euclid* v. *Heaton* had additional and perhaps unexpected ramifications since the proposal making the effective date of the amendment 1971 was nullified. All provisions took effect immediately, thereby allowing an immediate increase in the salaries of judges in 1968 rather than January 1, 1970 as the General Assembly had stipulated. The effect upon the Supreme Court Justices was to give them a $6,000 pay raise eighteen months sooner than the General Assembly had intended. *See,* "Here Come the Judges," *Toledo Blade,* June 24, 1968, p. 12, col. 2.

voters of the right to vote for and adopt changes in their form of government.

The issues raised and the effect upon the administration and organization of the Ohio judicial system are extremely grave. There are four judges above the age of 70 now running for re-election in Ohio. There are at least seven above the age of 70 who are eligible to seek re-election in 1970. There are eight judges presently serving who were re-elected in November 1968 whose ages exceed 70 years and whose offices can now be brought under attack since they were elected after the adoption by the voters of the revised judicial amendment to the Ohio constitution. Also, decisions rendered by these eight re-elected judges are now under a cloud and will be subject to reopening and attack. At least one such decision has already been challenged on the ground that the judge was not lawfully seated. Motion for Rehearing, *Stillmaker* v. *Department of Liquor Control,* 18 Ohio St. 2d —, June 18, 1969.

The condensed ballot text described few changes to the Ohio Constitution. In view of the Ohio Supreme Court's current analysis, other sections dealing with the jurisdiction of the appellate courts, the constitutional right to file original actions, the creation of the courts and the control of the practice of law, for example, are all invalid because they were not included by the Secretary of State in the condensed ballot text.

There is no justifiable state interest advanced by the Supreme Court of Ohio in any of the cases decided by it construing the phrasing of the ballot text which would justify that court's interpretation. Its decision, then, must be considered arbitrary in the constitutional sense, depriving the voters of Ohio their cherished right of full and effective suffrage without due process of law.

This Court has not heretofore had occasion to examine definitively the extent of the right of state voters, under the Due Process Clause of the Fourteenth Amendment, to cast their votes effectively and without dilution. The recent voting right cases have all arisen under the Equal Protection Clause, involving discriminatory exclusions of types of voters or other discriminatory dilutions of their voting power. But conceptually and practically the Due Process Clause contains no exclusion or exception as to voting rights of state voters. Those rights, as well as any other aspect of liberty, can effectively be denied without due process of law and by arbitrary means. The plain denial of such effective voting rights that has occurred in this case affords an opportunity for this Court to make the right to vote, the right that is so fundamental to our way of life, even more effective by extending to it the principles of the Due Process Clause.

CONCLUSION

For the foregoing reasons this petition for leave to intervene and petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Section 1, Amendment 14

Constitution of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Art. IV, Constitution of the State of Ohio

(Amended Substitute House Joint Resolution No. 42)

JOINT RESOLUTION

Proposing to amend sections 1 and 2, to enact sections 3, 4, 5, and 6, and to repeal sections 3, 4, 6, 7, 8, 10, 12, and 14 of Article IV, and sections 12 and 13 of Article XI as adopted in 1851, of the Constitution of the State of Ohio, relative to administration and organization of the courts of Ohio.

Be it resolved by the General Assembly of the State of Ohio, three-fifths of the members elected to each house concurring therein, that there shall be submitted to the electors of the state in the manner prescribed by law at a special election to be held on the first Tuesday after the first Monday in May, 1968 a proposal to amend sections 1 and 2, to enact sections 3, 4, 5, and 6, and to repeal sections 3, 4, 6, 7, 8, 10, 12, and 14 of Article IV, and sections 12 and 13 of Article XI as adopted in 1851, of the Constitution of Ohio to read as follows:

Section 1. The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas, * * * and such other courts inferior to the * * * *supreme court* as may from time to time be established by law.

Section 2. (*A*) The supreme court shall, until otherwise provided by law, consist of * * * *seven* judges, * * * *who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice.* If any * * * *member of the court* shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice * * * *or the acting chief justice* may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. * * * A majority of the supreme court shall be necessary to constitute a quorum or to * * * *render a judgment.*

* * * *(B) (1) The supreme court* shall have original jurisdiction in * * * *the following:*

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction * * * *as follows:*

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases in which the death penalty has been affirmed;

(iii) Cases involving questions arising under the constitution of the United States or of this state * * *.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained * * *.

(c) Such revisory jurisdiction of the proceedings of administrative officers *or agencies* as may be conferred by law * * *;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;.

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3 (B) (4) of this article.
* * *

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor.

Section 3. (A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B) (1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2 (B)(2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

Section 4. (A) There shall be a court of common pleas in each county of the state. Any judge of a court of common pleas may temporarily hold court in any county. Each county shall have at least one resident judge and such additional resident judges as may be provided by law. In counties having more than one judge, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. If the judges are unable because of equal division of the vote to make such selection, the judge having the longest total service on the court of common pleas

shall serve as presiding judge until selection is made by vote. The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the supreme court.

(B) The courts of common pleas shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

(C) Unless otherwise provided by law, there shall be a probate division of the courts of common pleas, and judges shall be elected specifically to such probate division and shall be empowered to employ and control the clerks, employees, deputies and referees of such probate division of the common pleas courts.

Section 5. (A) (1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.

(2) The supreme court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas temporarily to sit or hold court on any other court of common pleas or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(C) The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of comomn pleas. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

Section 6. (A) (1) The chief justice and the justices of the supreme court shall be elected by the electors of the state at large, for terms of not less than six years.

(2) The judges of the courts of appeals shall be elected by the electors of their respective appellate district, for terms of not less than six years.

(3) The judges of the courts of common pleas shall be elected by the electors of the counties in which their respective courts are located, for terms of not less than six years, and each judge of a court of common pleas shall reside dur-

ing his term of office in the county in which his court is located.

(4) Terms of office of all judges shall begin on the days fixed by law, and laws shall be enacted to prescribe the times and mode of their election.

(B) The judges of the supreme court, courts of appeals, and of the courts of common pleas, shall, at stated times, receive, for their services such compensation as may be provided by law, which shall not be diminished during their term of office. The compensation of all judges of the supreme court, except that of the chief justice, shall be the same. The compensation of all judges of the courts of appeals shall be the same. Common pleas judges shall receive such compensation as may be provided by law. Judges shall receive no fees or prerequisites, nor hold any other office of profit or trust, under the authority of this state or of the United States. All votes for any judge, for any elective office, except a judicial office, under the authority of this state, given by the general assembly, or the people shall be void.

(C) No person shall be elected or appointed to any judicial office if on or before the day when he shall assume the office and enter upon the discharge of its duties he shall have attained the age of seventy years. Any voluntarily retired judge, or any judge who is retired under this section, may be assigned with his consent by the chief justice or acting chief justice of the supreme court to active duty as a judge and while so serving shall receive the established compensation for such office, computed upon a per diem basis, in addition to any retirement benefits to which he may be entitled. Laws may be passed providing retirement benefits for judges.

EFFECTIVE DATE AND REPEAL

If adopted by a majority of the electors voting on this amendment, the amendment except paragraph (B) of the Schedule shall take effect January 10, 1970, and existing sections 1 and 2, and sections 3, 4, 6, 7, 8, 10, 12, and 14 of Article IV of the Constitution of Ohio shall be repealed

from such effective date, Paragraph (B) of the Schedule and the repeal of sections 12 and 13 of Article XI adopted in 1851, shall become effective immediately upon the adoption of this amendment by the electors of this state.

SCHEDULE

Upon the effective date of this amendment:

(A) Provision shall be made by law for the disposition of all pending cases in accordance with the procedural law in effect at the time of the effective date of this amendment.

(B) In accordance with the provisions of this article, the general assembly shall enact such laws and the supreme court shall promulgate such rules as will give effect to the provisions herein.

(C) All laws and rules of court in existence upon the effective date of this amendment shall continue in effect until superseded or changed in the manner authorized by this amendment.

(D) All judges of the probate courts shall become judges of the courts of common pleas.

(E) Any judge who is holding office on December 31, 1969, and who would be eligible for re-election in 1970 for a term beginning in 1971 except for his age and the provisions of division (C) of Section 6, Article IV, shall be eligible nevertheless to be re-elected in 1970 for one additional term as judge of the same court.

CHARLES F. KURFESS,
Speaker of the House of Representatives.

JOHN W. BROWN
President of the Senate.

Adopted March 1, 1968.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 8th day of March, A.D. 1968.

/s/ TED W. BROWN
TED W. BROWN,
Secretary of State.

File No. 18.

Constitution of the State of Ohio

ARTICLE XVI

AMENDMENTS

1. This constitution may be amended and how.

Either branch of the general assembly may propose amendments to this constitution; and, if the same shall be agreed to by three-fifths of the members elected to each house, such proposed amendments shall be entered on the journals, with the yeas and nays, and shall be submitted to the electors, for their approval or rejection, on a separate ballot without party designation of any kind, at either a special or a general election as the general assembly may prescribe. Such proposed amendments shall be published once a week for five consecutive weeks preceding such election, in at least one newspaper in each county of the state, where a newspaper is published. If the majority of the electors voting on the same shall adopt such amendments the same shall become a part of the constitution. When more than one amendment shall be submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment, separately. (Adopted Sept. 3, 1912.)

Revised Code of the State of Ohio

Section 3505.06, Revised Code, provides in part:

"The questions and issues ballot need not contain the full text of the proposal to be voted upon. A condensed text that will properly describe the question, issue, or amendment shall be used as prepared and certified by the secretary of state for state-wide questions or issues or by the board for local questions or issues. If such condensed text is used, the full text of the proposed question, issue, or amendment together with the percentage of affirmative votes necessary for passage as required by law shall be posted in each polling place in some spot that is easily accessible to the voters."

APPENDIX B

THE STATE OF OHIO,
City of Columbus.

1969 *TERM*

The State of Ohio, ex rel.
Roy E. Miller,
Relator,

To wit: Wednesday, June 18, 1969

vs.

John F. Gwin et al., Stark County
Board of Elections and Ted W. Brown,
Secy. of State,
Respondents.

No. 69-321
IN PROHIBITION

This cause originated in this Court upon the filing of a petition for a writ of prohibition. An answer to the petition was filed by Respondent Secretary of State, a demurrer and brief by Respondents Board of Elections and a reply brief by the Relator, and this cause was heard in the manner prescribed by law.

On consideration thereof, the writ of prohibition is hereby allowed on authority of State, ex rel. Graves, v. Brown, 18 Ohio St. 2d 61, prohibiting board of elections from placing name of Clay E. Hunter on the November ballot as a candidate for Judge of the Canton Municipal Court. Consideration of the further relief prayed for is premature.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 18 day of June, 1969.

THOMAS L. STARTZMAN *Clerk*
By SAM F. ADKINS *Deputy*

The State, ex rel. Graves, v. Brown, Secy. of State, et al.

[Cite as State, ex rel. Graves, v. Brown, 18 Ohio St. 2d .]

(No. 69-217 — Decided April 30, 1969.)

IN PROHIBITION.

This is an original action filed in this court seeking a writ of prohibition to prevent the Secretary of State and the members of the Cuyahoga County Board of Elections, as respondents, from placing the name of Stephen A. Zona upon the ballot, as a Democratic candidate for nomination for the office of Judge of the Parma Municipal Court for a term commencing January 1, 1970, in the primary election to be held May 6, 1969.

It is stipulated that Judge Zona (who is currently serving on the Parma municipal bench) was 70-years old January 6, 1969, and it is alleged in the petition that he would be more than 70 years of age when he would take office if successful in the general election, in violation of Section 6(C) of Article IV of the Ohio Constitution.

The motion of Judge Zona to intervene as a party respondent was allowed, and the cause was submitted on April 25, 1969, for decision upon relator's motion for judgment on the pleadings.

Mr. Harvey O. Mierke, Jr., and *Mr. Frederick J. Payne*, for relator.

Paul W. Brown, John L. Dowling, for respondents.

Messrs. Saker, Yannon & Sferrella and Mr. Theodore R. Saker, for intervenor-respondent.

Per Curiam. Section 6(C) of Article IV of the Ohio Constitution, adopted by the voters on May 7, 1968, provides in part:

"No person shall be elected or appointed to any judicial office if on or before the day when he shall assume the office and enter upon the discharge of his duties he shall have attained the age of seventy years."

Section (E) of the schedule of the foregoing amendment states:

"(E) Any judge who is holding office on December 31, 1969, and who would be eligible for re-election in 1970 for a term beginning in 1971 except for his age and the provisions of division (C) of Section 6, Article IV, shall be eligible nevertheless to be re-elected in 1970 for one additional term as judge of the same court."

No reference to the import of Section (E) of the schedule appeared in the condensed ballot text prepared pursuant to Section 3505.06, Revised Code.

In the case of *Euclid* v. *Heaton* (1968), 15 Ohio St. 2d 65, 238 N. E. 2d 790, this court followed the case of *State, ex rel. McNamara*, v. *Campbell* (1916), 94 Ohio St. 403, 115 N. E. 29, and held that unless a postponement of the effective date of a proposed constitutional amendment is submitted to the voters, Section 1 of Article XVI of the Ohio Constitution requires that the amendment become a part of the Constitution upon the date of its adoption by the voters. Logic and consistency dictate that this result must also obtain where the effectiveness of a portion of an amendment is sought to be delayed.

Section (E) of the schedule represents an attempt to postpone the effective date of a part of the constitutional amendment. If the General Assembly had intended that Section (E) be given effect, it could have provided that the question of postponement be submitted to the electorate as a part of the condensed ballot text. The failure to so have presented the question to the electorate destroyed the efficacy of Section (E) of the schedule. Therefore, relator's motion for judgment upon the pleadings is sustained and the writ of prohibition is allowed.

Writ allowed.

MATTHIAS, Acting Chief Justice, COLE, O'NEILL, SCHNEIDER, and HERBERT, JJ., concur.

JONES and DUNCAN, JJ., dissent.

COLE, J., of the Third Appellate District, sitting for TAFT, C.J.

JONES, J., of the Eleventh Appellate District, sitting for ZIMMERMAN, J.

OPINION NO. 68-110

Syllabus:

A judge who is currently holding office and who otherwise would be eligible for re-election is not disqualified from running for re-election in November, 1968, for the reason that he will have attained the age of seventy years by the time he would assume the office for the term to which he was re-elected.

To: Ted W. Brown, Secretary of State, Columbus, Ohio
By: William B. Saxbe, Attorney General, July 5, 1968

I have before me your request for my opinion wherein you inquire whether a judge who is currently holding office and who would be otherwise eligible for re-election, is disqualified from running for re-election in November, 1968, by the passage of Amended Substitute House Joint Resolution No. 42 at the special election held May 7, 1968, if he will have attained the age of seventy years by the time he would assume the office for such term to which he was re-elected.

There was submitted to the electors of Ohio on May 7, 1968, Amended Substitute House Joint Resolution No. 42 which included a proposal to enact Section 6 of Article IV of the Ohio Constitution and a "Schedule" which contained a limited exception from the operation of Section 6 of Article IV, *supra,* for certain judges.

Section 6(C) of Article IV of the Ohio Constitution proposed by Amended Substitute House Joint Resolution No. 42 provides, in part:

> "(C) No person shall be elected or appointed to any judicial office if on or before the day when he shall assume the office and enter upon the discharge of its duties he shall have attained the age of seventy years. * * *"

The amendment proposed by Amended Substitute House Joint Resolution No. 42 received a majority of the votes of the electors voting on the question.

Section 1 of Article XVI of the Ohio Constitution provides, in part:

> "* * * Such proposed amendments shall be published once a week for five consecutive weeks preceding such election, in at least one newspaper in each county of the state, where a newspaper is published. If the majority of the electors voting on the same shall adopt such amendment the same shall become a part of the constitution. * * *"

The Ohio Supreme Court, in *Euclid* v. *Heaton*, Case No. 41178, 15 Ohio St. (2d), 65, decided June 19, 1968, held that Section 1 of Article XVI, *supra*, and its earlier case *State, ex rel. McNamara* v. *Campbell*, 94 Ohio St., 403, required that an amendment of Section 2, Article II to the Constitution proposed by the General Assembly pursuant to the authority of Section 1 of Article XVI, *supra*, became effective on May 7, 1968, the date upon which it received the votes of a majority of the electors voting on the question in the special election in which it was submitted.

The first paragraph of the syllabus in the case of *State, ex rel. McNamara* v. *Campbell*, 94 Ohio St., 403, reads:

> "A provision in a joint resolution of the General Assembly of Ohio, submitting to the electors of the

> state a proposed amendment to the Constitution, that the same shall not go into effect until a time later than that fixed by Section 1 of Article XVI of the Constitution, is inoperative and void, unless the proposition to postpone the taking effect of such proposed amendment beyond the time named in the Constitution is also submitted to the electors of the state and adopted by a majority of those voting on the proposition."

The proposal to amend Section 2 of Article IV, *supra,* was submitted in the same proposed constitutional amendment as the proposal to enact Section 6 of Article IV.

I can determine no difference in the method of submitting the amendment of Section 2 of Article IV and the enactment of Section 6 of Article IV to the electors. Consequently, I am constrained to conclude that Section 6(C) of Article IV became effective upon its passage on May 7, 1968.

Section (E) of the "Schedule" of Amended Substitute House Joint Resolution No. 42 provides:

> "(E) Any judge who is holding office on December 31, 1969, and who would be eligible for re-election in 1970 for a term beginning in 1971 except for his age and the provisions of division (C) of Section 6, Article IV, shall be eligible nevertheless to be re-elected in 1970 for one additional term as judge of the same court".

This language was included in the text of the amendment published as required by Section 1 of Article XVI of the Ohio Constitution "once a week for five consecutive weeks preceding such election, in at least one newspaper in each county of the state, where a newspaper is published."

Although Section 1 of Article XVI as interpreted in *State, ex rel. McNamara* v. *Campbell, supra,* required the Court to conclude in *Euclid* v. *Heaton, supra,* that the establishment of an effective date at a date later than that fixed

by Section 1 of Article XVI, was "inoperative and void, unless the proposition to postpone the taking effect • • • is also submitted to the electors of the state and adopted by a majority of those voting on the proposition," I find nothing in the laws or Constitution of Ohio nor in the *McNamara* case, *supra*, which would require that all language of a proposed amendment appear on the ballot that is submitted to the electors, in order to be operative and valid. To the contrary, Section 3505.06, Revised Code, provides, in part:

> "The questions and issues ballot need not contain the full text of the proposal to be voted upon. A condensed text that will properly describe the question, issue, or amendment shall be used as prepared and certified by the secretary of state for state-wide questions or issues or by the board for local questions or issues. If such condensed text is used, the full text of the proposed question, issue, or amendment together with the percentage of affirmative votes necessary for passage as required by law shall be posted in each polling place in some spot that is easily accessible to the voters."

Pursuant to the foregoing authority, the Secretary of State condensed the text of Amended Substitute House Joint Resolution No. 42. The pertinent language of the condensed text of the ballot submitted to the electors was:

> "• • • to prohibit the election or appointment to any judicial office of a person who shall have passed the age of 70 years • • •"

Pursuant to the requirement of Section 3505.06, *supra*, the full text of the proposed amendment was posted in each polling place. This requirement of Section 3505.06, *supra*, and the requirement that the full text be published for five consecutive weeks, was considered by the Ohio Supreme Court in *State, ex rel. Foreman* v. *Brown*, 10 Ohio St. (2d),

139 (1967). In the Court's opinion by Mr. Chief Justice Taft, there is quoted at page 149 from an earlier case the following language:

> "'* * * the possibility of misunderstanding seems remote especially when it is remembered that the full text of the amendment was published in at least one newspaper in each county once a week for five consecutive weeks preceding the election, and that the full text was duly posted in every polling place. Of course a greater degree of accuracy of expression would have resulted if the ballot had contained the lengthy involved technical terms of the entire amendment, but this is the very difficulty sought to be avoided by the statute which expressly states that the "ballot need not contain the full text of the proposal" and that a "condensed text" may be substituted therefor. * * *'"

The foregoing language is equally applicable to the condensation of Amended Substitute House Joint Resolution No. 42 prepared by the Secretary of State.

Recognizing that the full text of the amendment proposed by Amended Substitute House Joint Resolution No. 42, including the Schedule, was published for five consecutive weeks preceding the election, as required by the Constitution and the full text was posted at each polling place as required by Section 3505.06, *supra*, I conclude that the condensation "properly described" and included the "Schedule" and that the "Schedule" became effective immediately upon passage.

Accordingly, an anomalous situation exists: A constitutional provision is effective, which specifically makes ineligible for re-election at the election in November, 1968, a judge currently holding office who will have attained the age of seventy years by the time he will assume office for such term, while exempting from its provisions judges who are holding office on December 31, 1969, and who would be other-

wise eligible for re-election in 1970 for a term beginning in 1971, by permitting such judges to be re-elected for one additional term. I recognize that the reason for this anomoly was the intention of the General Assembly that the constitutional amendment proposed by Amended Substitute House Joint Resolution No. 42 was not to be effective until January 10, 1970, and the necessarily incidental intention that it was not to apply to judges running for re-election in 1968.

You do not ask about the eligibility of a candidate for election to judicial office at the election in November, 1968, who will attain the age of seventy years who is not running for re-election either because he was appointed to the judicial office or because he is not an incumbent and, therefore, I express no opinion on the validity of such candidacy.

The "Equal Protection" clause, Section 1 of Article XIV of the United States Constitution provides, in part, that:

> "• • • nor shall any State • • • deny to any person within its jurisdiction the equal protection of the laws."

The United States Supreme Court has interpreted this requirement to guarantee that "all persons shall be treated alike under like circumstances and conditions." *Yick Wo* v. *Hopkins*, 118 U.S., 356. The Equal Protection clause prohibits the Ohio Constitution from disqualifying some judges from running for re-election who have attained the age of seventy years while permitting other of the same age to run for re-election without some reasonable basis for making the distinction.

There is nothing inherent in holding judicial office on December 31, 1969, which would reasonably justify allowing such judge who would be seventy before he assumed office to run for re-election for one additional term while denying to a judge who holds judicial office after May 4, 1968, but before December 31, 1969, the same right to run for re-

election if he would be seventy before he assumed office for the term to which he was re-elected.

Consquently, either Division (E) of the Schedule is invalid because it is an unreasonable preference of some judges or Section 6(C) of Article IV is invalid because it works an unreasonable disqualification of similarly situated judges. It is clear that the people of Ohio could provide in the Ohio Constitution that no one who has attained the age of seventy year is eligible to run for judicial office. It is equally clear that there is no requirement that the Ohio Constitution have any limitation as to age of judicial candidates for re-election.

Given this choice of inherently permissible alternatives, I must be guided by the intention of the General Assembly of Ohio in proposing to the electors of Ohio, Amended Substitute House Joint Resolution No. 42 and the intention of the majority of the electors of Ohio in adopting it. It is clear from a reading of the exception contained in Division (E) of the "Schedule," *supra,* and the effective date of January 10, 1970, of the Resolution that the General Assembly intended that any persons holding judicial office who attained the age of seventy years on or before December 31, 1969, would be eligible for re-election to one term. In consideration of the fact that the full text was published once a week for five consecutive weeks prior to the election and a copy of the full text was posted at each polling place I conclude that those electors voting for the proposal intended that the incumbent judges on or before December 31, 1969, would be eligible for re-election.

The "Effective Date and Repeal" division of Amended Substitute House Joint Resolution No. 42 provides, in part:

> "If adopted by a majority of the electors voting on this amendment, the amendment except paragraph (B) of the Schedule shall take effect January 10, 1970. * * *"

Inasmuch as it is not constitutionally permissible to conclude that a judge who holds judicial office on or after May 4, 1968, but prior to December 31, 1969, may not run for re-election if he would attain the age of seventy years before he would assume office for the term to which he was re-elected while concluding that a judge who holds office on December 31, 1969, is eligible to run for re-election even though he would attain the age of seventy years before assuming office, I do conclude that the disqualification of judges running for re-election contained in Section 6(C) of Article IV is not effective until January 1, 1970.

Accordingly, it is my opinion and you are advised that a judge who is currently holding office and who otherwise would be eligible for re-election is not disqualified from running for re-election in November, 1968 for the reason that he will have attained the age of seventy years by the time he would assume the office for the term to which he was re-elected.

APPENDIX C

OFFICIAL
QUESTIONS AND ISSUES BALLOT
VOTE BALLOT WITH AN "X"

* * * * * * * * *

PROPOSED CONSTITUTIONAL AMENDMENT

3.

ADMINISTRATION AND ORGANIZATION OF OHIO JUDICIAL SYSTEM

(Proposed by Resolution of the General Assembly of Ohio)
A majority affirmative vote is necessary for passage.

YES	SHALL THE CONSTITUTION OF THE STATE OF OHIO BE AMENDED BY AMENDING SECTIONS 1 and 2, ENACTING SECTIONS 3, 4, 5 AND 6 AND REPEALING EXISTING SECTIONS 3, 4, 6, 7, 8, 10, 12 AND 14 OF ARTICLE IV AND BY REPEALING SECTIONS 12 AND 13 OF ARTICLE 11 AS ADOPTED IN 1851 TO PROVIDE THAT THE SUPREME COURT SHALL DECIDE ALL CASES BY MAJORITY VOTE, TO FIX THE POWER OF THE SUPREME COURT OF OHIO TO EXERCISE ADMINISTRATIVE SUPERVISION OVER ALL COURTS AND TO MAKE RULES OF PRACTICE AND PROCEDURE, TO PROHIBIT THE ELECTION OR APPOINTMENT TO ANY JUDICIAL OFFICE OF A PERSON WHO SHALL HAVE PASSED THE AGE OF 70 YEARS, TO EQUALIZE JUDGES' SALARIES AND TO ALLOW INCREASES IN COMPENSATION DURING TERM, TO REMOVE THE PROBATE COURT AS A CONSTITUTIONAL COURT AND TO AUTHORIZE THE CONSOLIDATION OF COUNTY PROBATE COURTS AND COURTS OF COMMON PLEAS?
NO	

United States of America
State of Ohio ss.
Office of the Secretary of State

I, TED W. BROWN, Secretary of State of the State of Ohio, do hereby certify that the ballot as above shown is the prescribed form for the Special Election to be held May 7, 1968.

Witness my hand and official seal at Columbus, this 8th day of March, 1968.

TED W. BROWN